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No. 881

Supreme Court of the United States

October Term, 1956

H. H. KEETON, SR., TRADING AND DOING BUSINESS AS VIRGINIA AUTO TOP COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOHN W. RIELY
H. BRICE GRAVES
1003 Electric Building
Richmond 12, Virginia
Counsel for Petitioner

HUNTON, WILLIAMS, GAY,
MOORE & POWELL
Of Counsel

Dated April 5, 1957

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
1. There Is a Substantial Conflict in the Cases on the Question Here in Issue	4
2. The Question Is One of Importance in the Administration of the Revenue Laws	6
Conclusion	8

TABLE OF CITATIONS

Cases

Bacon & Van Buskirk Glass Co. v. Luckenbill, 55-1 U.S.T.C. Par. No. 49,124 (S.D. Ill., 1955)	7
Brown v. Campbell, 57-1, U.S.T.C. Par. No. 9354 (N.D. Texas, 1956)	5
Cotter Bros. Glass Co. v. Luckenbill, 55-2 U.S.T.C. Par. No. 9,698 (S.D. Ill., 1955)	7
Hirasuna v. McKenney, 135 F. Supp. 897 (D. Hawaii, 1955)	5
John J. Roche Co. v. Eaton, 14 F. (2d) 857 (D. Conn., 1926)	5
Johnnie & Mack, Inc. v. United States, 123 F. Supp. 400 (S.D. Fla., 1954)	7
Johnnie & Mack, Inc. v. United States, 57-1 U.S.T.C. Par. No. 9420 (S.D. Fla., 1957)	5

Statutes

Page

Internal Revenue Code of 1939:

Section 3403 ..... 2, 4

Section 3403(c) 2

United States Code:

Title 28, Section 1254(1) 1

Code of Virginia (1950):

Section 58-318 4

Section 58-333 4

Rulings

S. T. 944, 1952-2 C. B. 255 7

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

H. H. Keeton, Sr., Trading and Doing Business as Virginia Auto Top Company, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit. The judgment reversed the judgment of the United States District Court for the Eastern District of Virginia, at Richmond, entered May 21, 1956 (R. 39), granting Petitioner a refund of excise taxes for the period October, 1952, through December, 1953, in the total amount of $467.67, plus interest.

Opinions Below

The opinion of the District Court is reported in 141 F. Supp. 516. Such opinion is printed at R. 33 and is copied in the Appendix, p. 1.

The opinion of the Court of Appeals is reported in 238 F. (2d) 878. Such opinion is copied in the Appendix, p. 5.

Jurisdiction

The judgment of the Court of Appeals was entered on November 8, 1956. An Application for Extension of Time for Applying for a Writ of Certiorari, seasonably filed, was granted by this Court on January 22, 1957, extending such time to April 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

Where the Taxpayer sold automobile seat cover material, cut it and installed it directly on the seats of automobiles,

under circumstances in which he never had completed seat covers in stock and never made a seat cover for sale, did the Taxpayer manufacture and sell automobile accessories? The position of the Taxpayer is that this question should be answered in the negative. He was not therefore liable for the tax imposed by § 3403(c) of the Internal Revenue Code of 1939.* Accordingly, the tax collected from him was improperly collected and he should be given judgment for its recovery as the District Court here held.

Statute Involved

Section 3403:

> "There shall be imposed upon the following *articles sold by the manufacturer,* producer, or importer, a tax equivalent to the following percentages of the price for which so sold:
>
> * * *
>
> "(b) Other automobile chassis and bodies * * * suitable for use in connection with passenger automobiles * * *.
>
> "(c) Parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 8 per centum. * * *."†

Statement of the Case

This is a suit for refund of Federal excise taxes levied against the Taxpayer under § 3403(c) with respect to his automobile seat cover business. The case was presented on a stipulation of facts and testimony of two witnesses called

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*All further statutory references will be to the Internal Revenue Code of 1939, as effective during the period here involved, unless otherwise specified. All emphasis will be added unless otherwise indicated.

†The statute, with official citation, is copied in full at R. 25.

by the Taxpayer. The facts are not in dispute and may be summarized as follows:

The Taxpayer owns and operates a proprietorship in Richmond, Virginia, under the name Virginia Auto Top Company. His only employees are his two sons (R. 42). Taxpayer's business consists of a general line of repair work on the interior of automobiles, including the making of cloth tops for convertible automobiles, repairing truck and bus cushions, repairing upholstery and fitting material to automobile seats (R. 42). About two-thirds of Taxpayer's work is in respect of convertible tops and general repairs, and about one-third of his work relates to covering or refurbishing automobile seats (R. 42). This case concerns only the latter type of work—the automobile seat covers.

Taxpayer's business, insofar as this case is concerned, consists of selling seat cover material to a customer who leaves the automobile at Taxpayer's place of business. The automobile seats and rear backrest are removed from the automobile and placed on a table (R. 50, 57). The seat cover material is measured on the seat itself and cut with shears (R. 58, 59). The material then is fitted and installed on the seat of the customer's automobile in the same manner that upholstery is installed, *i.e.*, with hog rings hooked to a ring around the seat (R. 48, 49). The backrest of the front seat of the automobile ordinarily is not removed, and the material is fitted to that backrest in the automobile (R. 57).

The portion of Taxpayer's business described above is commonly referred to and known as the custom seat cover business. Taxpayer carries no stock of seat covers and only cuts and installs the material selected by his customer on the automobile itself while it is in his shop (R. 34). At no time is there anything in existence in the Taxpayer's shop that

can be called a "seat cover." The material is tailored directly on the automobile seats and backrests (R. 62, 63).

The price to the customer for covering the seats and backrests of his automobile is determined by the Taxpayer by adding a figure for labor and overhead to the cost of the material plus a mark-up of 25% on the material (R. 44). The Taxpayer's business is not classified by the State of Virginia or the City of Richmond as a manufacturing operation. A license tax is assessed against the Taxpayer by those jurisdictions for the privilege of operating an automobile repair shop (R. 50). This is of some importance since manufacturers are not subject to license taxation in Virginia by reason of selling, at the place of manufacture, goods, wares and merchandise manufactured by them. See §§ 58-316 and 58-333, Code of Virginia (1950).

The manufacturers of seat cover material will not sell directly to Taxpayer. They sell only to other manufacturers and wholesale distributors. The Taxpayer is not considered to be a manufacturer within the industry in which he operates (R. 65).

The question to be decided in this case is whether, under the foregoing circumstances, the Taxpayer manufactured and sold automobile accessories, within the meaning of § 3403, as held by the Court below, or whether he sold materials and performed services in installing the materials on automobiles.

Reasons for Granting the Writ

1.

There Is a Substantial Conflict in the Cases on the Question Here in Issue

While there is not at the moment a conflict on the issue here in question in the Courts of Appeal, such a conflict may

be imminent. A case substantially indistinguishable on its facts from this case, *Hirasuna* v. *McKenney*, 135 F. Supp. 897 (D. Hawaii), was decided in favor of the Government contrary to the decision of the District Court here. The *Hirasuna* case has been appealed to the Court of Appeals for the Ninth Circuit and was argued in that Court on October 3, 1956. Although five months have elapsed since argument, the Court of Appeals for the Ninth Circuit has not yet, so far as we can determine, decided the *Hirasuna* case.

Furthermore, two district courts recently have decided the same question, one since the opinion was rendered by the Court below, in conflict with this case. Those cases, both decided within the jurisdiction of the Court of Appeals for the Fifth Circuit, are *Johnnie & Mack, Inc.* v. *United States*, 57-1, U.S.T.C. Par. No. 9420* (S.D. Fla., January 30, 1957), and *Brown* v. *Campbell*, 57-1 U.S.T.C. Par. No. 9354* (N.D. Texas, October 24, 1956).

As early as 1926 the District Court in Connecticut decided the same issue contrary to the decision of the Court below, *John J. Roche Co.* v. *Eaton*, 14 F. (2d) 857, in which the District Court said:

> "I hold that the dominant aspect of the transactions engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured en masse, but were fashioned specially in each instance for a specific customer, makes the furnishing of them but an incident of the major transaction. While the line of demarcation between a contract of sale and one for services and material is often elusive, that is not a consideration which impugns the validity or the reality of the distinction."

*Unofficially reported by Commerce Clearing House, Inc.

Correspondence with counsel in various parts of the country indicates that other cases involving exactly the same issue are pending or threatened in many other localities.

The District Court here and three other District Courts have decided the question at issue here against the Government. The Circuit Court here and a territorial District Court have decided the same question for the Government. The matter is awaiting decision in another Circuit Court. Other cases are pending. Should the Ninth Circuit decide in favor of the Taxpayer, a clear conflict between the Circuits would exist and a decision by this Court would be inevitable. To deny this petition now would be to deny Taxpayer any possibility of relief. Where judges disagree so sharply, the need for an authoritative determination is apparent. Only a decision by this Court on this relatively narrow question can eliminate the confusion now existing and terminate the substantial quantity of pending and threatened litigation.

2.

THE QUESTION IS ONE OF IMPORTANCE IN THE ADMINISTRATION OF THE REVENUE LAWS

A large volume of automobile seat covers is manufactured and sold to the trade as such in packages. There never has been any question concerning the application of the excise tax to sales of that type.

On the other hand, there are many small shops throughout the United States, similar to that operated by the Taxpayer, that do not carry automobile seat covers in stock or sell them as such. They carry rolls of cloth and other material in stock, sell the material and fit it directly to the seats of the automobiles belonging to their customers. In the case of the Taxpayer and many others, automobile seat

covers as such never are in existence separate and apart from the automobile itself.

The Internal Revenue Service apparently has had considerable difficulty in classifying an operation such as that performed by the Taxpayer for application of the excise tax. Before August 18, 1952, the Service ruled that the operation would not be classified as manufacturing if the customer were the individual owner of the automobile; it would be classified as manufacturing only if the seat covers were fashioned for dealers in automobiles. That obviously was an untenable distinction. See *Johnnie & Mack, Inc.* v. *United States,* 123 F. Supp. 400 (S. D. Fla., 1954). In S. T. 944, 1952-2 C. B. 255, the Service abandoned its illogical position and ruled that such an operation constituted manufacture regardless of the identity of the customer.

The change of position on the part of the Internal Revenue Service has resulted in substantial litigation in this general area. In addition to the cases involving automobile seat covers, the Government took the position, and lost, that the cutting and fitting of glass in automobile windshields and doors was subject to the excise tax. *Bacon & Van Buskirk Glass Co.* v. *Luckenbill,* 55-1 U.S.T.C. Par. No. 49,124 (S.D. Ill., 1955); *Cotter Bros. Glass Co.* v. *Luckenbill,* 55-2 U.S.T.C. Par. No. 9,698 (S.D. Ill., 1955).

A decision on the question by this Court would settle an issue that concerns many small taxpayers. Most of the claims involved are quite small. That of the Taxpayer amounts to only $467.67 for a period of fifteen months. But there are many small taxpayers similarly situated throughout the United States. A decision by this Court would put at rest much litigation now pending in the courts or contemplated. Such a decision is, therefore, important in the proper administration of the internal revenue laws.

Conclusion

The decision of the Court below relates to a matter of substantial importance in the administration of the internal revenue laws. The decision conflicts with at least three District Court decisions, and an identical issue is pending in the Court of Appeals for the Ninth Circuit. Taxpayer understands that numerous other similar cases now are pending or will be brought in the future in the lower courts. Review by this Court will therefore set at rest a question at issue in many cases at many places and will dispose of a substantial number of pending or threatened cases.

Accordingly, the decision below is one which should be reviewed by this Court and the writ sought by this petition should be granted.

Dated: April 5, 1957.

Respectfully submitted,

JOHN W. RIELY
H. BRICE GRAVES
1003 Electric Building
Richmond 12, Virginia
Counsel for Petitioner

HUNTON, WILLIAMS, GAY,
MOORE & POWELL
Of Counsel

APPENDIX

Opinion of the District Court

The plaintiff owns and operates a proprietorship in Richmond, Virginia, under the name of Virginia Auto Top Company. Plaintiff's business, among other things, consists of selling seat cover material to a customer, and then installing or fashioning such material into a seat cover in said customer's automobile. This portion of plaintiff's business is commonly referred to and known as the custom seat cover business. Plaintiff carries no stock of seat covers and only cuts and installs the desired material upon order of the customer. However, plaintiff does carry a varied stock of material. After the customer chooses his desired material from the stock, plaintiff places it on the seats and backrests of the customer's car, marks the material, then removing the material from the car, it is cut to fit. The cut material is then sewn together and fastened to the seats and backrests of the automobile. The price to the customer is fixed by the price of the material plus a mark up for labor and profit.

The Internal Revenue Service of the United States, hereinafter referred to as the defendant, on and after August 8, 1952, assessed an excise tax on all seat covers so made by the plaintiff. This was the manufacturer's tax on automobile accessories sold by the manufacturer under Section 3403(c), Title 26, U.S.C.A., 1939. Plaintiff paid a total of $640.39 in the period 1952 through the calendar year 1953, and thereafter filed claim for refund. The refund having been denied plaintiff brings this action.

Plaintiff contends that he is not a manufacturer of automobile accessories within the meaning of Title 26, § 3403(c), U.S.C.A., of the Internal Revenue Code 1939. It is his position that he sells seat cover materials and merely performs the labor of installing that material on the automobile of his

customer. Hence he is not a manufacturer within the meaning of Section 3403(c), supra.

The word "accessory" in the statute has been held to include electric cigarette lighters, seat covers, electric storage batteries, etc. *Masterbilt Products Corp.* v. *United States*, 42 F. Supp. 294, 95 Ct. Cl. 451; *Crawford Manufacturing Co.* v. *United States*, 50 F. 2d 280; *Universal Battery Co.* v. *United States*, Ct. Cl., 281 U.S. 580, at pages 563-584, 50 S. Ct. 422, 74 L. Ed. 1051. In the late case (1955), *Masao Hirasuna* v. *McKenney*, D.C., 135 F. Supp. 897, seat covers were held to be an accessory within the meaning of Section 3403(c). Thus I think it is clear that seat covers, as such, are within the meaning of the word "accessory" in the statute.

However, the crux of the matter in this case resolves itself to the question of whether the type of operation here involved may be construed to be manufacture within the meaning of Section 3403(c), supra. The *Hirasuna* case, supra, a Hawaiian case, holds that custom seat covers do come within the meaning of the word "manufacturer" in the statute. In that case the taxpayer ran a business identical in all respects to the business of the plaintiff in the case at bar. The Court held that the seat cover materials were raw materials and that the taxpayer had manufactured the seat covers, i.e., "We find that seat covers were in fact manufactured, for the cars came out of the shop with seat covers where there were none in the shop when the cars were driven in." 135 F. Supp. at page 900.

I am unable to accept the reasoning of the learned judge in this respect. The cases cited supra on what an "accessory" is, all deal with tangible objects which are complete units prior to attachment to the automobile. The Internal Revenue Service has always differentiated between manufacture and installation even to the extent of prorating the

retail cost, basis of the excise tax, to per cent of cost for the manufactured article and per cent of cost for the labor and installation. They then tax that portion which is manufactured and do not tax that portion which is labor and installation. Thus the accessory, as such, is clearly distinguishable from the labor necessary to make it a functioning part of the car. There are three steps necessary before the accessory becomes a part of the car, i.e., (a) the raw materials, (b) the actual manufacture of the raw materials into a finished useful object, and (c) the installation of this object on to the automobile. If the three-step test is applied here, then the raw materials would be those materials that went into the fabric itself, the bolt of fabric would be the "manufactured" object, i.e., the "accessory," and the cutting and attaching to the automobile of the fabric would be the installation. Actually, in the case at bar plaintiff is concerned only with the last two steps. He acquires the bolt of fabric from the manufacturer and he then applies this fabric, selected by the customer, to the customer's car. This principle is illustrated in the case of *Bacon and Van Buskirk Glass Co.* v. *Luckenbill*, 55-1 U.S.T.C., Par. No. 49, 124 (S.D. Ill., 1955), where the plaintiff was in the retail glass business. Plaintiff there would cut from a large plate of glass, glass for a windshield, and then install it in the customer's car. The Court did not write an opinion but based its holding on the fact that plaintiff did not manufacture the glass, but only cut it to size and installed it. *The Bacon and Van Buskirk* case, supra, was followed in the case of *Cotter* v. *Luckenbill*, 55-2 U.S.T.C., Par. No. 9698 (S.D. Ill. 1955).

The United States District Court of Connecticut in 1926 decided the case of *John J. Roche Co.* v. *Eaton*, 14 F. 2d 857, 858. The facts in that case were essentially on all fours

with the case at bar except that the plaintiff in the *Roche* case performed auto repairs in addition to custom slip covers. The Internal Revenue Service has undertaken to distinguish the *Roche* case from the type of case at bar. However, I think they are indistinguishable and that the conclusions in the *Roche* case are sound. In the *Roche* case the Court uses language appropriate to the instant case:

> "I hold that the dominant aspect of the transactions engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured en masse, but were fashioned specially in each instance for a specific customer makes the furnishing of them but an incident of the major transaction."

In view of the foregoing reasoning I hold that the work done by plaintiff does not come within the meaning of Section 3403(c), supra, and consequently plaintiff is not a manufacturer of auto accessories within the meaning of the statute.

Judgment for the plaintiff in the sum of $640.39 will be granted upon presentation of appropriate order.

(s) STERLING HUTCHESON
United States District Judge

April 24, 1956

Opinion of the Court of Appeals

Before PARKER, Chief Judge, and SOPER and FAHY,* Circuit Judges.

FAHY, Circuit Judge: Appellee taxpayer[1] sued the United States in the District Court for the Eastern District of Virginia to recover the amount of certain excise taxes he had paid on an assessment under section 3403(c) of the Internal Revenue Code of 1939, 53 Stat. 410, as amended, 26 U. S. C. §3403 (1952).[2] The court gave judgment for the taxpayer and the United States appeals.

The taxes were levied on the theory that taxpayer was a manufacturer[3] who sold automobile accessories, namely, automobile seat covers, and thus came within the excise tax imposed by section 3403(c). Footnote 2, *supra*. There is no dispute that automobile seat covers are automobile accessories. The District Court so held. And see *Universal Battery Co.* v. *United States,* 281 U. S. 580, 583-584; *Masao Hirasuna* v. *McKenney,* 135 Fed. Supp. 897 (D. C. Hawaii). The question is whether taxpayer manufactured

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*Sitting in the Fourth Circuit by designation of the Chief Justice.

[1] H. H. Keeton, Sr., Trading and Doing Business as Virginia Auto Top Company.

[2] In pertinent part this section read as follows: "There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"* * *

"(b) * * * Other automobile chassis and bodies * * * suitable for use in connection with passenger automobiles * * *.

"(c) Parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 8 per centum * * *."

[3] U. S. Treas. Reg. 46, §316.4 (1940) provides in pertinent part:

"The term 'manufacturer' includes a person who produces a taxable article * * * from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles."

and sold such seat covers. If so he was not entitled to obtain judgment against the United States for the amount of tax he had paid.

Taxpayer's business insofar as here relevant may be described as the making of automobile seat covers on special orders of customers who select the material to be used from fabrics he carries in stock. Taxpayer reported to the Internal Revenue Service 60 per cent of the total charges incident to these covers for the tax period in question. The remaining 40 per cent of his charges was attributed to fitting and installation. Accordingly the disputed tax amounts to 8 percentum of 60 percentum of the total price of the covers.[4]

The price taxpayer fixed was for the completed job, which varied according to the value of the particular material selected by the customer. The price also included an item for fashioning and installing the cover in the car. In the end the price was made up of the cost of material and labor, an allowance for overhead, and percentage for profit.[5]

In making the seat covers taxpayer removes the seats and rear backrests of the automobile and places them on a table. The front backrests are left in the car. The material to cover each surface is measured and cut somewhat larger than the surface. This material is then drawn over the surface and marked with chalk around the edges. It is next removed and cut at the chalk markings. A binding is sewed around the edges, and the cut sections are sewed together and trimming is attached. The covers so made are not sewed

[4] The period involved was the last three months of 1952 and the twelve months of 1953. The amount of the judgment was $467.67, with interest.

[5] As we have seen 40% of the total price is omitted from the amount upon which the tax is computed, because attributed to fitting and installation.

to the seats of the car but are clamped by means of hog rings to the metal frames encircling the seats and backrests. When completed the seat covers constitute separate articles; they are not integral parts of the seats or backrests of the car. Furthermore, taxpayer does not sell the materials separately. He sells the finished product.

The District Court held taxpayer did not sell a manufactured article, expressing disagreement with the contrary conclusion reached in like factual circumstances in *Masao Hirasuna* v. *McKenney, supra.* The court pointed out that three steps were necessary before the accessory becomes part of the car, i.e. (a) the raw materials, (b) the actual manufacture of the raw materials into a finished, useful object, and (c) the installation of this object. Applying this three-step test it considered as raw materials those used in making the fabric, so that the bolt of fabric, which taxpayer purchased, constituted the manufactured object, i.e. "the accessory," and the cutting and attaching of the fabric to the automobile constituted installation. Our difficulty with this analysis is that while it is true that the fabric had been manufactured independently it became thereafter part of an additional manufacturing process leading to a finished seat cover.

Appellee contends that Congress had in mind automobile accessories which were first manufactured and then carried in stock as completed articles, that is, accessories sold altogether apart from any process of selection of material, fitting or installation. Nevertheless, the language used is broad enough to cover what here occurs. Indeed, one of the ordinary meanings of the verb "manufacture" is to "make by hand," though of course "to make by machinery" is also to manufacture. The articles here made, or manufactured, are seat covers, not the material of which the seat covers are made. Were we considering, for example, an excise tax on

the sale by a manufacturer of men's suits we would hardly fail to apply it to suits which were custom tailored of cloth selected by customers from rolls kept in stock, if this were a regular course of business, as is the making of these accessories by the present taxpayer. While more often than not one might think of an article sold by a manufacturer as an article completed independently of the method of selling it, this is not decisive. In applying section 3403(c) its language must be accorded reasonable scope, including different types of manufacturing. The tax must not be so narrowly applied as to leave beyond its reach activities which are fairly within the intendment and language of the statute. There is no "clear-cut reason for limiting the apparent generality of the statutory term involved." *Fides, A. G.* v. *Commissioner,* 137 Fed. (2d) 731, 734 (4th Cir.). The seat covers are distinctly identifiable as articles manufactured and sold by taxpayer, *Masao Hirasuna* v. *McKenney, supra.* Compare *John J. Roche Co.* v. *Eaton,* 14 Fed. (2d) 857 (D. C. Conn.).

Reversed and Remanded for Entry of Judgment for Appellant.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	4
Conclusion	6
Appendix A	7
Appendix B	10

CITATIONS

Cases:	
Campbell v. *Brown*, pending on appeal (C. A. 5th)	6
Clawson & Bals v. *United States*, 182 F. 2d 402	5
Hirasuna v. *McKenney*, 135 F. Supp. 897	5
Hirasuna v. *McKenney*, decided April 12, 1957 (C. A. 9th)	5, 10
United States v. *Armature Exchange*, 116 F. 2d 969, certiorari denied, 313 U. S. 573	5
United States v. *Armature Rewinding Co.*, 124 F. 2d 589	5
United States v. *Johnnie & Mack, Inc.*, pending on appeal (C. A. 5th)	6
Statute:	
Internal Revenue Code of 1939:	
Sec. 3403 (26 U. S. C. 1952 ed., Sec. 3403)	4, 5, 7
Sec. 3403 (a) (26 U. S. C. 1952 ed., Sec. 3403 (a))	7
Sec. 3403 (b) (26 U. S. C. 1952 ed., Sec. 3403 (b))	7
Sec. 3403 (c) (26 U. S. C. 1952 ed., Sec. 3403 (c))	8
Sec. 3441 (a) (26 U. S. C. 1952 ed., Sec. 3441 (a))	4, 8
Miscellaneous:	
Treasury Regulations 46, Sec. 316.4	5, 8

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 881

H. H. KEETON, SR., TRADING AND DOING BUSINESS AS VIRGINIA AUTO TOP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. Appendix 1–4) is reported at 141 F. Supp. 516. The opinion of the Court of Appeals (Pet. Appendix 5–8) is reported at 238 F. 2d 878.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1956. An application for an extension of time within which to petition for a writ of certiorari, dated January 17, 1957, was granted on January 22, 1957, extending such time to April 6, 1957. The petition for a writ of certiorari was filed

on April 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether taxpayer, who was in the business of "custom-making" automobile seat covers, was a manufacturer of automobile parts or accessories subject to the excise tax imposed by Section 3403 of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Sections 3403 (a), (b) and (c), and 3441 (a) of the Internal Revenue Code of 1939, and Section 316.4 of Treasury Regulations 46 (1940 ed.) are set forth in Appendix A, *infra*, pp. 7–9.

STATEMENT

Taxpayer brought suit to recover excise taxes of $640.39 assessed against him for 1952 and 1953. (R. 31–32.)[1] The taxes had been assessed by the Commissioner of Internal Revenue on the ground that taxpayer, as a "manufacturer" of automobile parts or accessories, was taxable on his sales by the terms of Section 3403 of the Internal Revenue Code of 1939. (R. 34.)

During the times here material, taxpayer was the owner and operator of a proprietorship in Richmond, Virginia, doing business under the name of Virginia Auto Top Company. He had two full-time employees, his sons, working with him. A portion of his work

[1] The designation "R." refers to the record printed as Appendix B to the brief for the United States before the Court of Appeals.

consisted of making and installing seat covers for new and used automobiles. For this purpose, taxpayer kept on hand an inventory of large rolls of seat-cover fabrics and quantities of material used for trim and piping. He kept no inventory of finished seat covers inasmuch as the seat covers he sold were made to individual order. (R. 41–43.)

When a customer came in to order seat covers for his automobile, the various materials and patterns would be displayed and the customer would select the material and trim he desired. (R. 43–44.) On the basis of the fabric selected, the customer would be quoted a price for the completed job of fashioning and installing the finished seat covers in his car. (R. 45–46, 55–56.) Taxpayer arrived at the prices he quoted by adding to the cost of labor, overhead, and material a 25 percent profit margin. (R. 44.)

Taxpayer testified that he never sold the material separately and that he could not charge enough that way to make it pay. He stated that his only sales were of the finished product, never the unfinished material. (R. 61–62.) Most of his sales were to new and used car dealers. (R. 53–54.)

Taxpayer's method of operation was as follows:

The seats and rear backrest were removed from the car and placed on a long table. The front backrest was not removed. (R. 46–47, 57.) A piece of material for each surface to be covered was measured against and cut roughly a little longer than that surface. The cut material was then drawn tightly over the surface and marked around the edges with chalk. The material was then removed, cut at the chalk

markings with heavy shears, and a band sewed around the edges. The various cut sections for a particular seat or backrest were then sewed together, and trims and piping were sewed around the edges. Special nylon or plastic thread was used for the sewing. The finished covers were not sewed to the seats, but were clamped with hog rings to the mental frames which encircle the seats and backrests. The seats and rear backrest were then replaced in the car. (R. 47–48, 57–60.)

The manufacturer's excise taxes assessed against taxpayer were based upon 60 percent of his total sales of automobile seat covers. In accordance with Section 3441 (a) of the Internal Revenue Code of 1939 (Appendix A, *infra*, p. 8), the remaining 40 percent of the selling price was an allowance for fitting and installation. (R. 31, 37–38.)

The District Court decided that taxpayer was not a manufacturer of automobile accessories. (Pet. Appendix 1–4.) The Court of Appeals held that taxpayer's activities constituted manufacturing, and reversed the judgment of the District Court. (Pet. Appendix 5–8.)

ARGUMENT

There is no basis for further review of this case. The Court of Appeals correctly held that taxpayer was a "manufacturer" of automobile parts or accessories taxable under Section 3403 of the Internal Revenue Code of 1939 (Appendix A, *infra*, p. 7), and no conflict with any Court of Appeals decision exists.

1. The work of chalking, marking, cutting and sewing the seat covers was plainly a manufacturing process by which taxpayer fashioned seat covers from rolls of material. This process ended with the new and identifiable manufactured article—an article quite distinct from the strips of cloth with which the process began. By common understanding and within the meaning of the applicable Treasury Regulations,[2] taxpayer was a "manufacturer" of automobile parts or accessories, and the Court of Appeals was correct in holding him taxable, as such, under Section 3403 of the Code. See, also, *United States* v. *Armature Exchange,* 116 F. 2d 969 (C. A. 9th), certiorari denied, 313 U. S. 573; *United States* v. *Armature Rewinding Co.,* 124 F. 2d 589 (C. A. 8th); *Clawson & Bals* v. *United States,* 182 F. 2d 402 (C. A. 7th).

2. There is no conflict with any decision of a Court of Appeals. On the contrary, in *Hirasuna* v. *McKenney,* decided April 12, 1957, subsequent to the filing of the instant petition, the Court of Appeals for the Ninth Circuit has resolved the identical question in complete agreement with the decision below.[3] While the question is now pending on the Government's appeal in the Court of Appeals for the Fifth

[2] Treasury Regulations 46, Section 316.4 (Appendix A, *infra,* pp. 8–9).

[3] For convenience the recent opinion of the Ninth Circuit in the *Hirasuna* case and the dissenting opinion are reproduced in Appendix B, *infra,* pp. 10–26. Citing the opinion of the District Court of Hawaii in *Hirasuna* v. *McKenney,* 135 Supp. 897 (which the Court of Appeals affirmed), taxpayer concedes in his petition (p. 5) that "case [to be] substantially indistinguishable on its facts from this case." Further, in his application to the Chief Justice dated January 17, 1957, for exten-

Circuit from two District Court decisions,[4] it does not appear likely that the Fifth Circuit will disagree with the careful opinions of the two circuits which have already passed upon it. Certainly, there is no occasion to anticipate conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
I. HENRY KUTZ,
WALTER R. GELLES,
Attorneys.

MAY 1957.

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sion of time for applying for a writ of certiorari taxpayer stated:

> If the Court of Appeals for the Ninth Circuit should reverse the decision of the District Court in the *Hirasuna* case there will be a clear conflict in the Circuits with respect to the issue involved in the instant case, and in that event Applicant believes that it would have substantial grounds for requesting this Court to issue a writ of certiorari to the Court of Appeals for the Fourth Circuit to review the instant case. On the other hand, if the Court of Appeals for the Ninth Circuit affirms the decision of the District Court in the *Hirasuna* case Applicant would not propose to seek a writ of certiorari in this case.

[4] *Campbell* v. *Brown*, set for hearing on May 8, 1957, on appeal from the judgment of the District Court for the Northern District of Texas, dated October 24, 1956 (1957 C. C. H., par. 9354); *United States* v. *Johnnie & Mack, Inc.*, on appeal from the judgment of the District Court for the Southern District of Florida, dated January 30, 1957 (1957 C. C. H., par. 9420).

APPENDIX A

Internal Revenue Code of 1939:

SEC. 3403. TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(a) [as amended by Sec. 544 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 481 (a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 8 per centum, except that on and after April 1, 1954, the rate shall be 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semitrailer, shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(b) [as amended by Sec. 481 (b) of the Revenue Act of 1951, *supra*] *Other Chassis and Bodies, Etc.*—Other automobile chassis and bodies, chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 10 per centum, except that on and after April 1, 1954, the rate shall be 7 per

centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(c) [as amended by Sec. 544 (b) of the Revenue Act of 1941, *supra;* Sec. 605 (c) (1) of the Revenue Act of 1950, c. 994, 64 Stat. 906; and Sec. 481 (c) of the Revenue Act of 1951, *supra*] Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum, except that on and after April 1, 1954, the rate shall be 5 per centum. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 3403.)

SEC. 3441. SALE PRICE.

(a) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3441.)

Treasury Regulations 46 (1940 ed.), promulgated under the Internal Revenue Code of 1939:

SEC. 316.4 *Who is a manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw

material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax, and not the person who buys, and assembles a taxable article from, such component parts.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 14,995. April 12, 1957

MASAO HIRASUNA, DOING BUSINESS AS MIKE'S AUTO TOP SHOP & UPHOLSTERY SHOP, *Appellant*,

v.

S. V. MCKENNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Before ORR, FEE, and HAMLEY, Circuit Judges.

HAMLEY, Circuit Judge:

The question presented on this appeal is whether the federal manufacturers' excise tax applies to automobile seat covers which were custom-made and installed on the order of used car dealers. The trial court held that the tax applies, and dismissed this suit for a tax refund. Plaintiff appeals.

The essential facts are not in dispute. During the years here in question, appellant taxpayer, Masao Hirasuna, operated a business under the style of "Mike's Auto Top and Upholstery Shop," in Honolulu. A good part of his business, and the only part with which we are here concerned, consisted of the making and installing of automobile seat covers on the order of used car dealers.

Appellant covered the seats of from two to five cars a day, his business coming from about a dozen used car dealers in the area. The procedure on each car be-

gan with the taking out and measuring of the cushions. The cloth was then cut to an approximate length and laid on top of the cushion. It was next pulled tight, pinned, and marked with chalk. The facing cloth was then pinned on and chalked. The cloth was next taken off and cut, the piping was sewed, and the cut portions were sewed together. The seats were then vacuum cleaned, and, if necessary, the springs were replaced. The factory seat covers were not removed, but rips in them were repaired by sewing. The corners of the seats were wadded with cotton, after which the new covers were installed with tacks or hog rings. Variations in the operation were required according to the construction of the back cushion and the presence or absence of movable arm rests.

The prices appellant charged car dealers for sets of custom-made seat covers were eighteen dollars for fibre, twenty-eight dollars for plastic, and thirty-five dollars for leatherette. These prices included all material and labor, but did not include any allowance for a federal excise tax. Appellant testified that about two-thirds of the price represented the cost of material.

Early in 1953, agents of the district director of internal revenue for the Hawaii District made an assessment against appellant in the sum of $1,766.70 for excise taxes due as the manufacturer of automobile parts and accessories. This assessment covered the years 1949 to 1952, and up to September, 1953. It was stipulated that $374.78 of this sum was properly assessed on sales not here in question. This left in dispute, as the tax claimed to be due on the manufacture and sale of seat covers on the order of used car dealers, the sum of $1,391.92. The sum so assessed excluded from consideration that portion of the price which, in the view of the district director, repre-

sented a reasonable charge for installing the covers after they had been made. Appellant paid the tax as assessed, and regularly filed his claims for refund, which preceded the bringing of this action.

The taxing statute in question is § 3403 (c) of the Internal Revenue Code of 1939, 53 Stat. 410, as amended, 26 U. S. C. A. (I. R. C. 1939) § 3403.[1] This statute is applicable here only if these seat covers were automobile "parts or accesories" which appellant, as the "manufacturer" thereof, "sold" to the used car dealers. Appellant contends that the trial court erred in holding that these specified conditions were met with respect to the transactions which have been described.

First to be considered is the question of whether these custom-made seat covers are "parts or accessories," within the meaning of the taxing statute. Section 316.55 of Treasury Regulation 46 (1940 ed.), promulgated under the Internal Revenue Code of 1939, defines this term.[2] A substantially similar definition of the term has been held to be reasonable and proper. *Universal Battery Co.* v. *United States,* 281 U. S. 580, 74 Law Ed. 1051, 50 S. Ct. 422.

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[1] The pertinent part of this section reads as follows:

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * *

"(b) * * * Other automobile chassis and bodies * * * suitable for use in connection with passenger automobiles * * *

"(c) Parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 8 per centum * * *"

[2] The applicable portion of § 316.55 reads as follows:

"SEC. 316.55. Definition of parts or accessories. The term 'parts or accessories' for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to im-

Custom-made automobile seat covers are used primarily to "improve, repair, replace, or serve as a component part of" automobile bodies. Clause (a). They are designed to be "attached to or used in connection with" automobile bodies, to add to their utility or ornamentation. Clause (b). The primary use of such seat covers is "in connection with" automobile bodies. Clause (c). Hence, it would appear that such seat covers are "parts or accessories," under all three clauses of the first paragraph of § 316.55.

Appellant, however, directs attention to the second paragraph of § 316.55. He argues that, in view of this paragraph, an article is not to be deemed a "part or accessory" unless it has reached such a stage of manufacture that it is "commonly or commercially" known as a part or accessory. According to appellant, custom-made seat covers, prior to installation, cannot be deemed to have reached such a state of manufacture.

In our view, however, the second paragraph of § 316.55 is not meant as an additional requirement to be superimposed on the requirements set forth in the first paragraph. The real purpose of the second

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prove, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

"The term 'parts and accessories' shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles."

paragraph is not to restrict the scope of the first, but to prevent the first from being too narrowly construed in a situation where "fitting operations" are required in connection with installation.

We therefore conclude that custom-made automobile seat covers are "parts or accessories," within the meaning of the statute.

Next to be considered is the question of whether appellant was the "manufacturer" of these custom-made seat covers, within the meaning of the statute.

Appellant advances several arguments in support of his view that this was not a manufacturing process. One of these is that it could not be manufactured because the seat covers are not produced and kept in stock for sale as general articles of commerce. This contention was considered and rejected by the United States Court of Appeals for the Fourth Judicial Circuit in the very recent case of *United States* v. *Keeton*, (4 Cir.) — F. (2d) — decided November 8, 1956.[3] We are in accord with the view expressed in the Keeton case.

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[3] In holding that custom-made seat covers are subject to the federal excise tax, the court there said:

> "* * * While more often than not one might think of an article sold by a manufacturer as an article completed independently of the method of selling it, this is not decisive. In applying section 3403 (c) its language must be accorded reasonable scope, including different types of manufacturing. The tax must not be so narrowly applied as to leave beyond its reach activities which are fairly within the intendment and language of the statute. There is no 'clear-cut reason for limiting the apparent generality of the statutory term[s] involved.' *Fides, A. G.* v. *Commissioner*, 137 F. 2d 731, 734 (4th Cir.). The seat covers are distinctly identifiable as articles manufactured and sold by taxpayer. *Masao Hirosuna* v. *McKenney*, *supra* [135 F. Supp. 897 (D. C. Hawaii)]. Compare *John J. Roche Co.* v. *Eaton*, 14 F. 2d 857 (D. C. Conn.)." — F. (2d) —.

Appellant's principal contention appears to be that the operation in question could not be manufacture because it constitutes repair work. The operation is repair work, he asserts, because the dominant aspect of the transaction is the performance of work and not the production of material, and because the process is essentially for the purpose of restoring the article of another to its normal condition.

While, as before indicated, this case involves only the installation of seat covers for used car dealers, the record reveals that appellant installs seat covers on some new cars. Other persons engaged in the same business also undoubtedly install such covers in both new and used cars. Appellant's "repair" theory, now under discussion, would not apply as to new cars. If the theory is accepted, it would therefore be necessary for those engaged in the business to set up records differentiating between new and used car transactions.[4]

Turning to the merits of appellant's "repair" argument, it will first be observed that it finds no support in the treasury regulation defining the term "manufacturer." Section 316.4 of Treasury Regulation 46 (1940 ed.), promulgated under the Internal Revenue Code of 1939, reads as follows:

"SEC. 316.4. *Who is a manufacturer.*—The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as

[4] Certain other administrative difficulties would also be encountered in giving effect to this "repair" theory. It is likely that seat covers are sometimes installed in used cars, not because the original upholstery is in need of repair, but to glamorize the used car for purposes of sale. In view of this fact, would the circumstance that a used car was involved be sufficient to establish the transaction as a "repair" job, or must there be some showing as to whether the original upholstery was actually in need of repair?

well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles."

We approved this definition in *United States* v. *Armature Exchange*, (9 Cir.) 116 F. (2d) 969, 971, cert. denied, 313 U. S. 573, 85 L. Ed. 1531, 61 S. Ct. 960, holding that it had been given the force of law by subsequent congressional re-enactments of the taxing statute.

Appellant's operation constituted manufacturing within the meaning of both clauses (1) and (2) of the quoted paragraph of § 316.4. He processed, manipulated, and changed the form of certain new materials, consisting of covering fabrics, facing cloth, and other items, to produce an automobile accessory, which is a "taxable article." He combined or assembled these materials to produce such "taxable article." It will be noted that this definition does not take into account the use which is to be made of the article after it has been produced.

Counsel for appellant, at the oral argument, urged that this definition of "manufacture" is so broad that, if given full effect, it would include a great many minor mechanical operations performed in the course of repairing machinery, equipment, or almost anything else. If this be granted, it still does not mean that the products of such minor operations will necessarily be subject to the tax. In order to be taxable, the article manufactured must be a "part or accessory," and it must have been "sold" by the manufacturer.[5] These requirements are sufficient to exclude from the operation of the tax most of the minor operations which appellant had in mind. In any event, the possibility that the definition may, sometime in the future, require limitation to meet the

[5] See footnote 1.

needs of some other case does not argue against application of the definition here.

But, quite apart from this definition, we do not believe that appellant's operations fall within the classification of "repair" transactions to which he makes reference. It is true that, in replacing broken seat springs and patching rips in the original upholstery, appellant did perform some repair work. The cost of this work was not included in computing the excise tax. But the installation of new, removable covers was in addition to this repair work.[6] The second phase of appellant's operation does not constitute repair, for the reason that his labor and efforts were not applied to the restoration of the existing article (the original upholstery), but were rather applied to the fashioning of a new and independent item.

We hold that appellant was the "manufacturer" of the seat covers in question.

Under the taxing statute in question, a tax is not to be imposed upon manufactured parts or accessories unless they are "sold" by the manufacturer. Appellant argues that he did not contract to sell the seat covers, within the meaning of the Uniform Sales Act, but supplied them under contracts for work, labor, and material. He also contends that the reimbursement claimed for the work of chalking, marking, cutting, and sewing the covers was an installation charge, and not part of a sales price.

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[6] While on the witness stand, appellant described the process of installing custom-made seat covers. He was asked if he took the factory cover off the seat. He indicated that he did not, saying: "Well, if there is [sic] any rips or some kind of damage I usually repair it and cover it." This would appear to be a recognition by appellant that any "repair" work involved in the process was that which was necessary in preparing the original upholstery to receive the custom-made covers.

The question is not whether appellant "contracted to sell" the seat covers, but whether he sold them. We believe that he did. The price charged for a manufactured article is, of course, intended to cover not only the cost of the raw material, but the labor involved in the manufacturing process. Here, the taxpayer quoted flat charges of eighteen, twenty-eight, and thirty-five dollars for the covers, the variance depending only on the kind of materials used. When the seat covers were installed, title passed to the used car dealers. This consummated a sale of the covers, within the meaning of 26 U. S. C. A. § 3403. Whether it was also a "sale" within the meaning of the Uniform Sales Act, is immaterial.

The work of chalking, marking, cutting, and sewing the covers was plainly a part of the manufacturing process. The work of installation took place after all of this had been done, and the seat covers had been made. As before indicated, the true installation charges were deducted in computing the tax.

Appellant contends that the assessment in question runs counter to the construction which the agency placed upon the taxing statute during most of the period covered by the assessment. Several evidences of the claimed inconsistent construction are relied upon, the first consisting of a number of public rulings.

The one public ruling which deals specifically with the kind of transactions involved in this case is dated August 18, 1952.[7] This ruling expressly supports the

[7] S. T. 944, 1952–2, Cum. Bull. 255. This provision reads in part:

"The Bureau has issued rulings heretofore that the only circumstances under which the tax does not apply to sale of seat covers by a manufacturer, is where the seat covers are individually designed, cut, tailored, and fitted by the

interpretation of the statute on which appellee here relies. It was issued near the end of the taxing period covered by the assessment under review. It contains a recital to the effect that, under previous rulings, such transactions were also held to be taxable.

Since there were no previous public rulings holding such transactions to be taxable, the "rulings" referred to in this recital must have been private rulings. The record indicates that neither appellant nor bureau representatives in Hawaii had knowledge of such private rulings prior to issuance of the August 18, 1952, public ruling.

The public rulings prior to August 18, 1952, upon which appellant relies are four in number. The first of these [4] deals with the tax liability of a jobber or dealer who cuts or processes raw or bulk material to

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manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attached to the manufacturer's sale thereof.

"Upon reconsideration of the matter, the Bureau is now of the opinion that where a manufacturer furnishes the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403 (c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons.

"The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past, to such sales."

[4] S. T. 824, XIV-2 Cum. Bull. 368 (1935).

produce a part or accessory. The ruling draws a distinction between an immediate repair job and a sale for future use. If the jobber or dealer cuts or produces a part or accessory from lengths or rolls of material for immediate use by a *repairman* in a *repair* job on which he is then working, the sale thereof by the jobber or dealer to the *repairman* is deemed to be a sale of material not subject to tax. If, however, the jobber or dealer transforms lengths or rolls of material into parts or accessories and places the finished articles in stock for future use or disposition, he thereby becomes, according to this ruling, the "manufacturer" of such articles, and his subsequent sale or use of them is taxable.

Appellant wants us to infer from this ruling that the agency thereby determined that one is not a "manufacturer" within the meaning of the statute unless he stocks the finished article for future use or disposition; and that if the article is prepared for immediate use, it is a sale of material not subject to tax.

This ruling, however, does not deal with the kind of transaction under review on this appeal. It deals with two kinds of transaction by a jobber or dealer—the production and stocking of articles for future disposition or use, and the production of articles for immediate use by a *repairman in a repair job.* Under the ruling, the first transaction is that of a "manufacturer," as would also be the case if appellant produced and stocked seat covers for future disposition or use.

The second transaction is a sale of material, and does not involve manufacture, because the article is to be immediately used by a repairman on a repair job. If appellant were being taxed for some article which he had produced for immediate use (by himself or another) on a *repair* job, the ruling referred to

above would be persuasive in his favor. Here, however, we have concluded that the installation of custom-made seat covers is not repair work. It follows that the ruling in question has no application to the facts of this case.

What is said above is also sufficient to distinguish the three other public rulings upon which appellant relies.[9] In each of such rulings, it is provided that the article described in the ruling will escape taxation only when it is processed for use in connection with an immediate repair job.

To be given any effect, an administrative construction must be a ruling which can reasonably be held to have decided the point presently in issue. *Anderson v. McKay,* (D. C. Cir.) 211 F. (2d) 798, 805. As indicated above, the four rulings just discussed did not deal with the point here in issue. We therefore conclude that these public rulings are not helpful in deciding the question of statutory construction now before us.

We do not have before us the question of whether private, as distinguished from public, rulings amounted to an administrative construction of the act, for no evidence as to any such private rulings is to be found in this record. Nor is there here a showing as to general inaction by the bureau with regard to the assessment of such transactions sufficient to present a question of administrative construction.

Appellant, however, refers to the fact that the agency failed to appeal from a 1926 district court decision adverse to the agency's present position, as

[9] S. T. 582, XI–2 Cum. Bull. 472 (1932) (repairs on automobiles, such as upholstering, replacement of woodwork, repair of fenders); S. T. 573, XI–2 Cum. Bull. 473 (1932) (rebabbiting connecting rods and reclaiming brake drums); S. T. 940, 1951–2 Cum. Bull. 214 (replacing glass).

an evidence of administrative construction to the effect that such transactions are not taxable. The decision in question was rendered in *John J. Roche Co. v. Eaton,* (*D. C. Conn.* 1926) 14 F. (2d) 857, 858. It was there held that the dominant aspect of the transaction engaged in by the taxpayer was that of work performed, and that the furnishing of specially fashioned materials was but an incident of the major transaction. The court was there speaking not only of custom-made seat covers, but of side curtains, tops, carpets, upholstery, and the repair of automobile bodies.

The pronouncement of the court was probably correct as to some or all of these other types of work. In view of the fact that the question of seat covers was apparently a minor phase of that case, we do not believe that the agency's failure to appeal represents an administrative construction of the statute favorable to appellant's position.[10]

On the record before us, the proof as to what administrative construction was in effect prior to August 18, 1952, is inconclusive. This, therefore, is not a case in which such constuction can be resorted to as an aid in determining the meaning of the stat-

[10] We also believe that the Roche case was not correctly decided, but that is beside the point with regard to our present inquiry concerning administrative construction. In *Johnnie & Mack, Inc.* v. *United States*, 123 F. Supp. 400 (S. D. Fla. 1954), the district court reached the same conclusion as was reached in the Roche case. The decision of the court in that case seemed to have been influenced by the view that, on August 18, 1952, the Commissioner of Internal Revenue made what the court thought was an invalid distinction between past sales to automobile owners and past sales to used car dealers. We do not think the distinction is invalid. In any event, however, this does not appeal to us as a good reason for refusing to apply the taxing statute in transactions involving automobile dealers.

ute. Our view as to that meaning, as recorded above, has accordingly been arrived at without reference to any determination the bureau may have made concerning the taxability of such transaction.

Affirmed.

JAMES ALGER FEE, *Circuit Judge,* dissenting:

The main opinion is erroneous because it apparently decides that the construction of the statute and regulations which is there adopted in 1957 would override a consistent long standing administrative interpretation by the federal agency itself.

This statute and the applicable regulations are not so plain in the commands thereof to leave nothing for construction. Indeed, these were construed contrary to our present interpretation in 1926 by the opinion in *John J. Roche Co.* v. *Eaton,* 9 Cir., 14 F. 2d 857. This theory was affirmed and adopted by a District Court in 1954 in *Johnnie & Mack, Inc.* v. *United States,* 123 F. Supp. 400.

The main opinion here resolves the matter as if the case were of first impression. So does the decision in *United States* v. *Keeton,* 4 Cir., 238 F. 2d 878. But in the instant case the point was squarely raised that the agency had acquiesced in the construction of the statute in the Roche case for a period of over twenty-five years and, as a result, had left untaxed installers of seat covers on automobiles. It was also contended that this course of action was summarily reversed after the bulletin of August, 1952, by the identical agency. It may be agreed that the evidence was insufficient in the instant case. But the exact contention has been raised in other cases, notably, *Martin* v. *Andrews,* 9 Cir., 238 F. 2d 552, where we held that the suit was premature and where the merits were not considered. We should not bind all of the judges of

this Court to our present interpretation in other causes where more evidence of contrary administrative practice might conceivably be.

It may be said that the main opinion does not rule upon the administrative practice. True, it does not in so many words. But we should not disapprove of the long standing judicial construction initiated by the Roche case and brought up to date in the Johnnie & Mack case. If the agency were proven to have acquiesced therein, it might be possible that such an acceptance of the rule might be binding upon not only the agency, but also upon this Court. Then we should not hold that the bulletin of August 18, 1952, is the only public ruling which deals specifically with the type of transaction in this litigation here. It may be the only one in this record. Besides, there might be debate as to how "public ruling" should be defined. Further, simply because we have construed the statute and regulations as res nova, we should not construe other pronouncements of the bureau as dealing with collateral matters in virtue of our construction. It might be possible to show that all the action and inaction of the agency in this field is consistent with an interpretation binding upon us and inconsistent with our present holding on the letter of the statute and regulations. Again, no "private rulings" are found to be in the record. But there should be no intimation of an estoppel or waiver based upon knowledge or lack of knowledge. Finally, the inaction of the agency and their failure to collect taxes from or prosecute installers of seat covers over a limited area should be treated as of great importance. Instead, the practice in the limited area seems to be treated as of no consequence.

It is conceivable, if all these elements were connected to show a national policy of the agency over

a long period of years, supported by judicial holdings initiating the construction and tying into the practice, an administrative construction might be shown by the evidence in another case. We would not have then the excuse that the matter had not been brought to our attention here. See *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 397, Note 13.

The following excerpt is pertinent:

> "There are persuasive reasons for construing 'debentures' and 'certificates of indebtedness' in accordance with the Treasury's original interpretation of those terms in this statute's altogether comparable predecessors. In *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294, 315, Mr. Justice Cardozo said:
>
> 'administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U. S. 760, 763; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375; *Interstate Commerce Commn.* v. *N. Y., N. H. & H. R. Co.*, 287 U. S. 178. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'
>
> Against the Treasury's prior longstanding and consistent administrative interpretation its more recent ad hoc contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied congressional acquiescence, through the 1918 amendment to the statute (supra, p. 391), which has ever since continued in effect, and through Congress hav-

ing let the administrative interpretation remain undisturbed for so many years. See *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 53; *Norwegian Nitrogen Prod. Co.* v. *United States, supra,* at p. 313. Still further, it is an interpretation which is in accord with the generally understood meaning of the term 'debentures.' Cf. *First Nat. Bank* v. *Flershem,* 290 U. S. 504, 508. 'The words of the statute [a stamp tax statute] are to be taken in the sense in which they will be understood by that public in which they are to take effect.' *United States* v. *Isham, supra,* at p. 504."

The cause should be remanded with directions for the trial court to find on the subject upon further evidence, or at least it should be recognized that such expressions are not binding upon this Court in another case.

(Endorsed:) Opinion and Dissenting opinion. Filed Apr. 12, 1957.

PAUL P. O'BRIEN, *Clerk.*

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